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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH CARTER,

Defendant and Appellant.

B288591

(Los Angeles County
Super. Ct. No. BA435752)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed with directions.

Christian C. Buckley, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Sean McGahey Webb and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

Two years after Keith Carter was sentenced to an aggregate term of 22 years four months in prison, the California Department of Corrections and Rehabilitation (CDCR) notified the superior court that the sentence was unlawful because one component of it was short by eight months. The court thereafter held a second sentencing hearing and added the eight months to Carter's sentence, bringing it to 23 years. Carter contends the court had no authority to increase a component of his sentence without reevaluating the whole, and in any event must be given an opportunity to exercise its newly established discretion to strike a recidivism enhancement. We agree with the second contention, decline to reach the first, and affirm with a direction to reevaluate Carter's sentence.

BACKGROUND

In separate cases in 2015, Carter pleaded guilty to forcible rape (Pen. Code, § 261, subd. (a)(2)) and was convicted by a jury of evading a peace officer causing injury (Veh. Code, § 2800.3, subd. (a)).¹ Division Two of this District affirmed the evading judgment. (*People v. Carter* (July 27, 2017, B271107) [nonpub. opn.])

In the rape case, case No. BA435752, Carter admitted to a prior serious felony conviction. (§§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d).) He was sentenced to state prison for the low term of three years, doubled to six years as a second strike, plus five years for the prior serious felony, for a total of 11 years.

In the evading case, case No. BA424194, the trial court found that Carter had suffered a prior strike conviction, denied his motion to dismiss the strike, and sentenced him to a total of

¹ Undesignated statutory references will be to the Penal Code.

19 years in state prison, comprising the upper term of seven years, doubled to 14 years as a second strike, plus five years for the aforementioned prior serious felony conviction.

In selecting the high term, the court commented, “The conduct was extremely reckless. It was captured on video. We saw the defendant careening [through] three narrow streets in a residential area at a time of day when you’d expect all kinds of people, children, to be around. Driving was at such a high velocity that he flipped an SUV. [¶] The injuries [suffered] by Ms. Williams were severe. She was hospitalized for three days, she was in extreme pain, and if I recall correctly, she testified that she still is traumatized by what happened to her. [¶] I’m also noting the defendant’s lengthy criminal history which spans [four] states and goes back to 1986. [¶] It includes six felony convictions and five misdemeanor convictions.”

After imposing the evading sentence the trial court revisited the rape sentence pursuant to section 1170.1.² It subordinated the rape case to the evading case, and where previously it had doubled the low term of three years in the rape case, it now reduced that term to one-third of the six-year middle term, doubled. The court calculated this modified component as three years four months, which it ordered to run consecutive to

² Section 1170.1 provides in pertinent part: “[W]hen any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, . . . and a consecutive term of imprisonment is imposed . . . , the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions [or] prison terms” (§ 1170.1, subd. (a).)

the evading sentence. The court also stayed the five-year serious felony enhancement imposed in the rape case.

The trial court's calculation of the subordinate prison term was in error, as one-third of six years is two years, and double that is four years, not three years four months.

Two years later, the CDCR informed the trial court of the calculation error. The court then held another sentencing hearing at which it corrected the error, which increased Carter's sentence by eight months.

Carter appealed from the resulting sentence.

DISCUSSION

Carter contends that the trial court erred in resentencing him by failing to reconsider the propriety of all components of the aggregate sentence, instead merely tacking eight months onto one component. He also contends that newly-enacted Senate Bill No. 1393 requires that the case be remanded for reconsideration of his recidivism enhancements. We agree with the second contention, which essentially moots the first.

Carter's sentence involved three components: A discretionary upper term imposed in the evading case, one-third of the middle term imposed in the rape case, and two mandatory five-year recidivism enhancements pursuant to section 667, subdivision (a)(1), one being stayed.

At the time, the trial court had no authority to strike the serious felony enhancement findings, but on September 30, 2018, the Legislature amended section 1385 to remove the provision that prevented such a course. As a result, a court may now strike a prior serious felony conviction for purposes of sentence enhancement under section 667, subdivision (a)(1). (Stats. 2018, ch. 1013, § 1 (Sen. Bill No. 1393), effective Jan. 1, 2019.)

An amendment to the Penal Code will generally not apply retroactively (see § 3), but an exception applies when the amendment reduces punishment for a specific crime. (See *In re Estrada* (1965) 63 Cal.2d 740, 745.) Reduction of a punishment indicates the Legislature has “expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act,” and “should apply to every case to which it constitutionally could apply.” (*Ibid.*) The exception to nonretroactivity extends to amendments that do not necessarily reduce a defendant’s punishment but give the trial court discretion to impose a lesser sentence. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

Carter argues the amendment to section 1385 applies retroactively to defendants in his position, and requires that the trial court be given an opportunity to exercise its newfound discretion to strike the recidivism enhancements imposed as part of his sentence. The People concede the point, and we agree. Although the trial court here had no discretion to strike the enhancement at the time of sentencing or resentencing, the record is silent as to whether it might have been open to doing so. Therefore, the matter must be remanded to afford the court an opportunity to exercise its discretion.

Such a remand renders Carter’s first contention—that the trial court erred by not reevaluating his aggregate sentence when correcting one part of it—essentially moot. “[A]n aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components.” (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.) In the process of exercising its newfound discretion to strike an enhancement the court may reconsider all sentencing choices. Because this reconsideration

involves exactly the same deliberative process whether prompted by a change in the law or a prior sentencing error, or both, we need not determine whether both impulses pertain, being satisfied that at least one does.

DISPOSITION

The convictions are affirmed. Upon remand, the trial court shall reevaluate Carter's sentence, including by determining whether to strike the enhancements imposed under section 667, subdivision (a)(1). If the court strikes one or both of the enhancements or otherwise changes the sentence it shall amend the abstract of judgment and forward the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

WEINGART, J.*

* Judge of the Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.